JD(ATL)—55—04
Novi, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

CADILLAC ASPHALT PAVING COMPANY and its alter ego or successor CADILLAC ASPHALT, L.L.C.

and **CASE 7-CA-46464**

LOCAL 247, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

and **CASE 7-CA-46565**

PATRICK F. RAYMO, an Individual

and

MICHIGAN LABORERS DISTRICT COUNCIL, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Party in Interest

and

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO
Party in Interest

Linda Rabin Hammell, ***Esq***., and
Michael Silverstein, Esq., for the General Counsel.
John Patrick White, Esq., and
Kurt M. Graham, Esq.
for the Respondent, Cadillac Asphalt, L.L.C.
Russell S. Linden, Esq., for the Respondent Cadillac Asphalt Paving Company.

Thomas "Tommy" Aloisio, President,
for the Charging Party Teamsters
Local Union No. 247.
Eric J. Frankie, Esq. on behalf of Party in
Interest, Michigan Laborers District Council.
J. Douglas Korney, Esq., on behalf of Party
in Interest, Local 324 Operating Engineers.
Bruce Rvedisveli, on behalf of Laborers
Local 1191.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard before me on June 28th and 29th, 2004, in Detroit, Michigan, pursuant to an amended consolidated complaint issued by the Regional Director for Region 7 of the National Labor Relations Board ("the Board") on January 7, 2004. The complaint is based on an amended charge in Case 7-CA-46464, filed by the Charging Party Local 247, International Brotherhood of Teamsters, AFL-CIO ("the Charging Party Union" or "the Teamsters") on August 27, 2003, and on a charge in Case 7-CA-46565 filed by the Charging Party, Patrick F. Raymo ("Charging Party Raymo" or Raymo") on September 2, 2003. The Michigan Laborers District Council ("Laborers") and Local 324 Operating Engineers ("Operators") have each intervened in this case as Parties in Interest. The complaint as amended at the hearing alleges that Respondent Cadillac Asphalt Paving Company "Paving" and its alter ego or successor Respondent Cadillac Asphalt, L.L.C. ("L.L.C.") violated Sections 8(a)(1), (2), (3) and (5) of the National Labor Relations Act ("the Act"). Paving and L.L.C. have filed an answer denying that they are a single employer or an alter ego of each other and have denied the commission of any violations of the Act.

Upon consideration of the testimony of the witnesses, the exhibits admitted at the hearing and the admissions and stipulations entered in this case and the positions of the parties as argued at the hearing and as set out in their briefs, I make the following:

Findings of Fact and Conclusions of Law[1]

A. <u>The Business of the Respondents</u>

The complaint alleges and Respondents admit, and I find, that at all times material until about June 30, 2003, Respondent Cadillac Asphalt Paving Company (Paving), a corporation with an office and place of business at 27575 Wixom Road, Novi, Michigan,

1 The following includes a composite of the credited testimony and the exhibits received at the hearing.

has been engaged in the asphalt paving of roads and parking lots, that at all material times since about June 30, 2003, Respondent Cadillac Asphalt, L.L.C. (L.L.C.), a limited liability company, with an office and place of business at 27575 Wixom Road, Novi, Michigan, has been engaged in the asphalt paving of roads and parking lots.

B. The Labor Organization

The complaint alleges, Respondent admits, and I find that at all times material herein, Local 247 International Brotherhood of Teamsters has been and is a labor organization within the meaning of Section 2(5) of the Act.

I. Background

The facts of this case are largely undisputed. Cadillac Asphalt, L.L.C. ("L.L.C.") was formed as a joint venture between Levy Company ("Levy") and Michigan Paving & Materials Company ("Michigan Paving" or "MPMC") with each company contributing various assets to the enterprise including Cadillac Asphalt Company ("Paving") located in Wixom, Michigan, as one of five operating units within the new joint venture. The parties have stipulated that Paving is an assumed name of a division of Levy.

Counsel for General Counsel alleges that L.L.C. is a single employer and/or successor to Paving. Respondents Paving and L.L.C. contend that L.L.C. is a separate and distinct legal entity with different management and a different structure of its operations. Respondents contend that as a result of these operational changes, L.L.C. no longer uses a truck driver classification, which was represented by the Teamsters and that since the drivers' official job duties for L.L.C. have changed, the Teamsters do not represent an appropriate unit of L.L.C.'s construction employees. Respondents contend that L.L.C., no longer has a legal obligation to recognize the Teamsters as collective bargaining representative for the truck drivers, as those employees are now part of an appropriate bargaining unit consistent with their official job duties and are represented by either the Laborers or Operators Unions.

Counsel for General Counsel also alleges that L.L.C. violated Sections 8(a)(1), (2) and (5) of the Act by rendering assistance and support to the Laborers and Operators Unions and deducting money from employees' wages and remitting these monies to the Laborers and Operators Unions. Respondents contend that L.L.C. never required employees to sign union authorization cards, and never pressured or coerced any employees into signing up for the Laborers or Operators. L.L.C. acknowledges that it did recognize the Laborers and Operators as the bargaining representative for the two classifications of employees that it hired at its five facilities (laborers and equipment operators) as L.L.C. contends that employees in those classifications shared a community of interest and performed work within the jurisdiction of the Laborers and Operators and the majority of those hired were previously represented by the Laborers and the Operators. L.L.C. acknowledges that pursuant to its bargaining agreements with those organizations it did withhold and remit dues.

L.L.C. also notes that it is charged with having constructively discharged employee Patrick Raymo which it denies.

Counsels for General Counsel in their brief set out their central legal theories in this case. Initially they contend that L.L.C. is a *Burns*[2] successor and/or disguised continuance alter ego of Paving, citing the following evidence:

(a) the decades-old and long recognized unit of drivers was, and remains, an appropriate unit for the purposes of collective bargaining.
(b) When Teamsters 247 made its bargaining demand about July 18, 2003, L.L.C. had hired all of Paving's unionized drivers.
(c) L.L.C. continued Paving's business in basically unchanged form.
(d) Paving and L.L.C. have common ownership, management, business purpose, operations, equipment, customers, and supervision.
(e) One of L.L.C.'s business purposes is to evade contractual obligations to Teamsters Local 247.

General Counsels contend that "Paving never withdrew from multi-employer bargaining and was therefore bound by the 2003 – 2008 labor agreement that its bargaining agent, Michigan Road Builders Association "MRBA," negotiated with Teamsters Local 247," as:

(1) L.L.C. shares Paving's contractual obligation as its alter ego.
(2) L.L.C. had a duty to honor the provisions of the 2003-2008 contract even as a *Burns* successor, because L.L.C. has forfeited the privilege sometimes granted to *Burns* successors to set their own initial terms and conditions; by: (a) making it 'perfectly clear' that it would hire all of the drivers, before apprising them that L.L.C. would not honor their Teamsters terms and conditions of employment. This is known as the 'perfectly clear' exception to *Burns*; (b) committing unfair labor practices such as announcing that the Teamsters union had no place in the new organization, and by requiring the drivers to join other unions and to relinquish their Teamsters membership and benefits.

II. Sequence of Events

Levy was the sole owner of Paving until June 30, 2003. This ownership interest included facilities on Wixom Road in Novi, Michigan and on Dix Road in Detroit, Michigan. Paving had offices, a maintenance garage, and storage space for trucks, pavers, rollers, graders and other equipment at the Wixom Road facility. Paving

2 *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

performed asphalt paving services including milling[3] and conditioning[4] surfaces, on public highways and roads, private parking lots, and residential subdivisions.

Three unions represented Paving's hourly employees for collective bargaining. They are Teamsters Local 247, Operating Engineers Local 324, and Laborers Local 1191. At the end of June 2003, the Teamsters represented five unit employees at Paving. They were Prime Driver and union steward Steve Pierce, prime drivers Patrick Raymo and Markeit Robinson and lowboy drivers Tim Taylor and Dan O'Neill. The Teamsters drove prime trucks and lowboy trucks to and from various job sites. A prime truck is a single-axel truck, with a cab and chassis, along with various pumps and levels to apply the prime bonding agent. Prime is the coating that goes on roads to bond the new asphalt to the old. The truck also contains a hose to allow the driver to hand spray the prime. The employee either sprays by hand, standing on the ground, or with a bar from inside the truck. A lowboy truck is a tractor with a long, low, gooseneck trailer that moves equipment, and sometimes material from location to location. L.L.C. General Manager Alan Sandell testified that Respondent continued to use these lowboys through the end of the 2003 season. The paving season usually extends from April to November. L.L.C. ordered new hydraulic, beavertail trailers, similar to lowboys for the 2004 season. The differences between the two type of trailers are mechanical ones that do not affect the function of the vehicle or the required skills of the drivers. The lowboy drivers continued to transport equipment for L.L.C. in the same manner and using the same equipment as they had for Paving.

Paving drivers picked up and dropped off their trucks at the Wixom Road lot. The drivers picked up their trucks in the morning and proceeded to the jobsites. The work crews usually consisted of 6-8 employees, a paver operator, two screw men, one raker, two rollers, a prime truck driver and a foreman. The foreman was the only supervisor on the job site except for an occasional visit from a supervisor or inspector. Upon arrival at the jobsite, the prime drivers heated the prime and as necessary cleaned the area with brooms and shovels which was preparation work also performed by laborers. After applying the prime, the drivers shoveled and raked asphalt, operated the rollers and performed any other task required to assist the work crews. Some times foremen instructed the drivers to perform these tasks and at other times the drivers performed them on their own initiative. Prime drivers thus regularly performed these tasks just as laborers did, and also ran screws, rollers and loaders just as operators did.

As of June 2003, Paving employed three paving foremen: Harry Hatfield, Mickey Smith and Rick Ling. The conditioning foremen were Walter Beard and Dave Farrell and Don Mester was a grade checker. These foremen reported to area operations managers Fred Aiken, Clyde Hatfield and Bruce Nacey. The area operations managers scheduled the Teamsters drivers to work on a daily basis. The operations managers

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3 "Milling" is the use of a machine with big teeth to mill down to a certain depth around the old asphalt to provide room for the new asphalt.

4 "Conditioning" involves repair or preparation work on a hard surface before the crew begins to pave.

reported to Vice-President Rod Elliot who reported to Levy's Corporate Vice-President Andy Schmidt.

Teamsters Local 247 has represented Paving's drivers for collective bargaining over 30 years. Local 247 is a member of Teamsters Joint Council 43, which represents all Teamsters locals in the state of Michigan. At all material times Paving's Teamsters unit has been covered by collective bargaining-agreements between Teamsters Joint Council 43 and the Michigan Road Builders Association ("MRBA") an association of employers in the building trades since 1986, through May 2003. Local 247 President Thomas Aloisio testified that on April 28, 2003, Joint Council 43 and the MRBA commenced negotiations for a new contract. His testimony was unrebutted and I credit it. As of this date Paving had neither withdrawn a power of attorney from the MRBA, nor notified Teamsters Local 247 that it no longer wished to engage in multi-employer bargaining. Paving was listed on the MRBA. The existence of a power of attorney purportedly signed by Paving is in dispute and was not authenticated by General Counsel at the hearing. Paving was listed on the MRBA's roster for multi-employer bargaining with Michigan Teamsters Joint Council 43. On June 13, 2003, the MRBA and Joint Council 43 reached a tentative agreement on a new five-year contract. As of that date Paving had not revoked a power of attorney to the MRBA nor advised Teamsters Joint Council 43 that it wished to withdraw from multi-employer bargaining. The parties final galley-proof printed version was completed in March 2004. The new contract is retroactive to June 1, 2003, and runs through May 31, 2008.

On June 30, 2003, Levy and MPMC entered into a joint venture and partnership to create L.L.C. which became effective on July 1, 2003. MPMC was formerly known as Thompson-McCully which is an entity wholly owned by Old Castle. Levy and MPMC each own 50% of L.L.C.. MPMC contributed three asphalt plants with their associated equipment in the joint venture (Clarkston, Whitmore Lake and Belleville), with three paving crews from each facility. Levy contributed its Wixom (Paving) and Dix facilities with their associated equipment as well as some additional monies.

L.L.C.'s board of directors consists of two MPMC representatives and two Levy representatives. The current chairman of the Board is Levy representative Evan Weiner. The board of directors does not control day-to-day operations of L.L.C., nor does it set labor relations policies for L.L.C.. When MPMC assumed control of L.L.C.'s operations on July 1, 2003, MPMC knew that Levy had collective bargaining agreements at Paving's Wixom Road facility with Teamsters Local 247, Operators Local 324 and Laborers Local 1191. With this knowledge, L.L.C.'s Wixom Division Manager Rod Elliot executed new contracts with the Laborers and Operating Engineers for the period 2003-2008. These contracts incorporated with only slight variations, the MRBA master agreements that served as Paving's contract with Laborers Local 1191 and Operating Engineers Local 324. Elliot crossed out "July," and inserted "June" on the face of the Operators' Agreement and dated the document June 1, 2003, and signed it on behalf of L.L.C.. L.L.C. also signed similar agreements with the Operators and Laborers at all of the other facilities in the joint venture. The only bargaining unit whose bargaining representative was not recognized by L.L.C. was Teamsters Local 247.

There was no hiatus in operations for the transfer from Paving to L.L.C.. The Paving employees worked on June 30, 2003, and on the next day, July 1, 2003. L.L.C. performs the same work as Paving including paving, milling and conditioning of public highways, private parking lots and subdivisions. Paving and L.L.C. serve many of the same customers. Almost all hourly Paving employees were retained by L.L.C. including the five Teamsters employees, who continued to park their vehicles at the Wixom Road lot, drive the same prime and low boy trucks, assisted in Operators and Laborers work as necessary and reported to the same foremen through the remainder of the 2003 paving season. These foremen continued to report to area operations managers Fred Aiken, Clyde Hatfield and Bruce Nacey for the remainder of the 2003 paving season which ended Thanksgiving week. Former Paving Vice-President Elliot remained at the Wixom facility as the Wixom Division Manager. Only top level management changed after the formation of L.L.C. and they and clerical personnel worked at off-site facilities resulting in little if any direct communications with the drivers, who used the same equipment, performed the same job functions and reported to the same supervisors for the remainder of the 2003 season.

Prime truck driver and Teamsters Union steward Steve Pierce testified that there had been rumors among Paving employees in 2003, that Paving would be purchased by Old Castle/Thompson-McCully/MPMC. Pierce testified he was aware that Thompson-McCully had an unfavorable opinion of the Teamsters and he inquired of area operations manager Fred Aiken, before and after the Old Castle purchase collapsed and after L.L.C. announced the joint venture, whether this would impact the Teamsters. On each occasion Aiken assured him that Paving /L.L.C. would employ Teamsters at least through the end of the 2003 season. Aiken said, "everything was going to stay the same." I credit Pierce's testimony which was unrebutted as Aiken was not called to testify.

On July 7, Respondent Paving held a meeting in Novi for its Wixom and Dix employees including the five Teamsters drivers and approximately 50 other Paving employees. L.L.C. President Dennis Rickard announced the L.L.C. joint venture and said that the change was effective July 1st. Following this announcement MPMC's safety director, Marlene Van Patton, took over the meeting and asked all employees to fill out employment applications and W-4 forms which she said was merely to update L.L.C.'s records and told the employees to leave many of the applications' sections blank such as the work qualifications and experience levels. Teamsters members Steve Pierce, Patrick Raymo, Markeith Robinson, Tim Taylor and Dan O'Neill filled out the employment applications and W-4 forms at the meeting as did the other employees. Van Patton told the employees that L.L.C.'s new payroll checks had not arrived yet. Pierce testified that three days later on July 10th that he picked up his paycheck and noted that his and the other Teamsters's members checks were Cadillac Asphalt Paving checks whereas other employees' checks were Thompson-McCully checks. Pierce also testified that he asked about L.L.C.'s 401(k) plan. The Teamsters-MRBA contract did not provide for this benefit. Levy Paving had permitted its unionized employees to participate in the Company's 401(k) plan. Pierce was told by L.L.C.'s new general manager Alan Sandell that L.L.C. did not have a 401(k) plan for hourly employees. Both Pierce and Raymo

testified that L.L.C. did not mention any other changes in wages, benefits, or job responsibilities at the July 7th meeting. I credit their testimony which was unrebutted. On July 8th the Teamsters drivers reported to work as usual, performed the same jobs, drove the same trucks and received their schedules as usual and reported to the same foremen as before. No one from L.L.C. interviewed them for their jobs or told them when they had been hired as L.L.C. employees.

On July 15th, employees Pierce, Raymo and Taylor were waiting to begin their shift because of a rain delay and Elliot told them he wanted to meet with them. L.L.C. also contacted lowboy driver Dan O'Neill who was not scheduled to work until later that day. Markeith Robinson could not be reached as a result of illness in his family. L.L.C. met with four of the five Teamsters that morning. Alan Sandell, Rod Elliot and Fred Aiken represented management. No notice of this meeting had been given to Teamsters Local 247 President Aloisio. Elliot commenced the meeting by telling the four Teamsters employees that L.L.C. would not employ Teamsters and that if they wanted to continue working at L.L.C., the prime truck drivers would have to be represented by the Laborers union and the lowboy drivers would have to be represented by the Operators union. Teamsters Steward Pierce expressed concerns about the legality of Elliot's order and asked to talk to Aloisio. Pierce also expressed concerns about pensions and insurance. Pierce told the management representatives that O'Neill had 21½ years invested in the Teamsters pension fund which fully vests at 20 years of service. Pierce had about 16 years, Taylor had 10 years and Raymo had almost 5 years which is the minimum vesting point under the Teamsters plan. Robinson had less than two years of Teamsters service. He told management that he, O'Neill and Taylor would lose substantial sums at retirement if they left the Teamsters plan. Elliot responded, "We all have to make sacrifices." In addition Raymo told management that his wife was to undergo major surgery in the near future and that he had been assured by the Teamsters health insurance plan agents that she would be fully covered. Sandell told them that when they changed unions, they could immediately participate in Thompson-McCully's management insurance program until they met the threshold requirements for coverage under the Laborers and Operators insurance programs. Sandell also told them that L.L.C. would guarantee their wages, that those becoming covered by the laborer's union would continue to receive the higher Teamsters wage rate and that any future wages negotiated by the Laborers and Operators unions would be added to their existing salaries.

Sandell then left the meeting and human resources representative Mike Piecuch joined it shortly afterwards. He told the drivers that he had heard of their concerns, conferred with his supervisors and would ease their switch to the other unions by laying the drivers off as of this date, July 15th. Pierce inquired whether the drivers should come to work the next day. Elliot replied, "if Fred Aiken has no problems scheduling you tomorrow, we have no problems scheduling you." The meeting concluded by Sandell and Elliot allowing the drivers some limited time to contact their bargaining representatives. I credit the foregoing testimony of Pierce and Raymo which was unrebutted as Sandell and Elliot who were called as witnesses by Respondent did not challenge their testimony. Piecuch was present at the hearing but he was not called to testify.

Teamsters steward Pierce further testified that on July 17th Taylor called him and told him that L.L.C. management had told Robinson to switch unions that day or the next day. Pierce confirmed this with Robinson who signed a dues authorization check off card for the Laborers Local 1199 on July 18th. On the same day Pierce called Aiken and asked, "If we refuse to switch unions are we laid off as of tomorrow." Aiken replied yes, that is the situation. Pierce told Aiken he was not switching unions and would park his truck. However later that day Aloisio persuaded Pierce to stay on the job to fight for the Teamsters recognition which he did. On the evening of July 18th Elliot met with Raymo and told him, "There is no sense of just hee-hawing, just switch. There is no sense to keep dragging it out because they (L.L.C.) gave us (the drivers) a week extra in the beginning to think about it …." Elliot then gave Raymo a folder containing Laborers benefits brochures and a Laborers business representative's business card. Raymo asked for more time and Elliot gave him the weekend to decide. Later that day Elliot met with Pierce and Pierce told him in the presence of Aiken, that he would not switch unions. He also told Elliot the Labor Board was involved and asked if he should come to work on Monday. Elliot said if it was okay with Aiken, it was okay with him for Pierce to work on Monday. I credit the testimony of Pierce over that of Elliot and Aiken who denied having threatened to lay off the drivers if they did not accept either the Laborers or Operators Unions as their collective bargaining representative

On that weekend Raymo discussed the ultimatum with his wife. He testified that they decided they could not risk the loss of the Teamsters health insurance coverage because of his wife's medical condition and did not want to risk the loss of his Teamsters pension. Raymo testified he "took the layoff" and on that Monday he called Elliot and Aiken to tell them he was taking the layoff. He also told Elliot that he wanted to spend more time with his son who had returned from military service in Iraq and that he wished to work with his wife in photography. He testified at the hearing that he was not motivated in taking the layoff because of either reason. I credit Raymo's testimony.

Teamsters Local 247 president Aloisio testified that after he was informed of the ultimatum to the Teamsters employees that he called Levy headquarters and obtained Alan Sandell's business address and then mailed a certified letter dated July 18th, to Sandell at L.L.C.'s address which states in part, "Our members were informed on Tuesday that Old Castle lowboy drivers would have to join the Operating Engineers and prime truck drivers would have to join Laborers Local 1191. Please contact me at your earliest convenience to schedule a meeting to straighten out this terrible mistake and injustice to our members." On July 22nd, Aloisio mailed a letter to L.L.C.'s Wixom Road facility and demanded that Respondent recognize Local 247 as the drivers' exclusive bargaining representative. He also stated that a majority of the drivers had designated Local 247 as their exclusive collective bargaining representative. Aloisio also had Pierce obtain signed Teamsters membership cards which were voluntarily signed by all five drivers and were submitted on July 22nd, to the Board's Regional Office with a petition seeking a representation election. The petition was withdrawn on July 30th, after he learned that the Board's Regional Officer had informed Pierce that L.L.C. was already obligated to bargain with the Teamsters and there was no need to file a petition.

Alioso also testified that in late July after several attempts he spoke with L.L.C. President and Board member Dennis Rickard and requested that L.L.C. pay the Teamsters' benefits. He offered to send Rickard a copy of the 2003-2008 labor agreement and offered to sit down and negotiate an alternative agreement if Rickard did not like the terms of the MRBA contract. Rickard did not meet with Aloisio and Aloisio then mailed a certified letter to Rickard dated August 8th, which states in part, "Mr. Rickard, just as you have done with the Operators and Laborers, I expect you to honor the Michigan Road Builders agreement as it pertains to the Teamsters. In that regard it is imperative that you immediately submit health, welfare and pension contributions on behalf of our members to the Michigan Conference of Teamsters Health & Welfare Fund and the Central States Pension Fund." General Counsel contends that Aloisio's version of the conversation with Rickard is the more credible and was consistent with his affidavit and was fact specific whereas Rickard's account was deficient of details and was uncorroborated. I credit Alioso's testimony as set out above.

It is undisputed that since July 2003, neither Paving nor L.L.C. has paid any pension or health and welfare benefits to the Teamsters' funds, nor have they remitted any dues to Local 247, for the Teamsters drivers. It is also undisputed that these unilateral actions were taken by Respondents without Local 247's permission and without bargaining. Respondent has, since July, made deductions from the Drivers' paychecks and remitted these monies to the Laborers and Operators vacation funds.

Teamsters steward Pierce telephoned L.L.C.'s payroll department shortly after the payroll deduction changes were made by Respondents and requested that L.L.C. cease making these unauthorized deductions. Pierce drafted and delivered a letter which stated in part on behalf of all five drivers, "We did not sign authorization slips for any of these deductions. We want you to cease immediately taking these deductions. We want to be reimbursed 100% of the deductions immediately." Pierce testified that in early August, Aiken called him at a jobsite and told him that the Laborer's business agent was coming to the jobsite to sign him up in the Laborers union. Pierce refused to do so when he was contacted by the business representative. Aiken denied this. I credit Pierce's testimony.

At the hearing, before the close of the General Counsel's case, General Counsel and the Respondents entered into the following stipulations which are designated as Joint Exhibit 3:

1. The joint venture among Levy Co., Michigan Paving and Materials Co., and Cadillac Asphalt L.L.C. took effect on July 1, 2003.

2. Until about July 15, 2003, Paving made contributions to the Michigan Teamsters Health & Welfare and Teamsters Central States Pension Plans on behalf of the five drivers at issue in this matter (Steven Pierce, Pat Raymo, Markeith Robinson, Timothy Taylor, and Dan O'Neill).

3. Until about July 15, 2003, Paving deducted union dues from the pay of the five drivers named above, and remitted the same to Teamsters Local 247.

4. Since about July 16, 2003, neither Paving nor L.L.C. has deducted union dues from the pay of the five drivers named above, or remitted the same to Teamsters Local 247.

5. At no time did L.L.C. receive a revocation of dues checkoff authority relative to Teamsters Local 247 from the five drivers named above.

6. At no time did L.L.C. receive dues checkoff authorizations relative to Teamsters Local 247 from any of the five drivers named above.

7. Since about July 16, 2003, neither Paving nor L.L.C. has made any contributions to the Michigan Teamsters Health & Welfare or Teamsters Central Sates Pension Plans on behalf of the five drivers at issue in this case.

8. Since about July 16, 2003, LCC has made fringe benefit contributions on behalf of the five drivers named above, during the periods that they worked at L.L.C., to health & welfare and/or pension plans negotiated by Michigan Laborers District Council and/or Operating Engineers Local 324, pursuant to the applicable provisions of those unions' collective bargaining agreements with L.L.C. for the period 2003-2008.

These parties also stipulated that the following individuals still work for L.L.C. as of the date of the hearing: Fred Aiken, Markeith Robinson, Dan O'Neill and Timothy Taylor. The parties also stipulated that it was more likely that July 7, 2003 is the date of the meeting in which applications were distributed. I accept these stipulations and find the date of this meeting was July 7, 2003.

III. Contentions of the Parties

A. Counsels for the General Counsel's Position

The General Counsels make several points and arguments in their brief. They contend that the Teamsters drivers unit was historically, and still is an appropriate unit for collective bargaining with L.L.C., citing *Overnite Transportation Co.*, 322 NLRB 723 (1996) for the proposition that it is not necessary for a unit for bargaining to be an optimum unit but only an appropriate unit. General Counsels cite *Lincoln Park Zoological Society,* 322 NLRB 263, 264 fn. 1 (1996) for the proposition that in historical units, a successor has a heavy burden to show that changes it made in operations rendered the long-standing unit inappropriate. General Counsels note that in the instant case,

Teamsters Local 247 has represented Paving's drivers for over 30 years. Even under the new alignment of their union affiliations, only the former Teamsters drivers operate the lowboys and spray the prime. There has been no showing that the Teamsters' unit lacks a sufficient community of interest to warrant appropriate unit status.

General Counsels further contend that on July 18th and continuing thereafter, Local 247 president Aloisio communicated legitimate bargaining demands and requests for recognition to L.L.C.'s agents. They cite *Stanford Realty Associates*, 306 NLRB 1061, 1066 (1992), quoting from *Marysville Travelodge*, 233 NLRB 527, 532 (1977), for the proposition that "a valid request to bargain need not be in any particular form … so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours and other conditions of employment." General Counsels also assert that a union official makes a legitimate bargaining demand when he informs the successor's agent that the union represents the predecessor employees and supplies the Employer's agent with a copy of the parties collective bargaining agreement, citing *MSK Corp.*, 341 NLRB No. 11, slip op. at 3 (Jan. 30, 2004). They also assert that the filing of an 8(a)(5) refusal to bargain charge is tantamount to a valid request for recognition and bargaining, citing *Spring Arbor Distribution Co.*, 312 NLRB 710, 712 (1993).

General Counsels assert that Local 247 made its bargaining demand after L.L.C. had hired a substantial and representative complement of its work force. By July 18th when Local 247 made its initial bargaining demand, L.L.C. had already announced the joint venture and invited Paving's hourly employees to fill out applications for the new company and continued to employ nearly all of Pavings hourly workers including all five drivers who worked for L.L.C. on July 18th. Thus L.L.C. employed a substantial and representative complement of Paving's Wixom drivers at the time of Local 247's recognition and bargaining demand. This supports a finding of successorship. *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 52 (1987). Thus L.L.C. has a duty to recognize and bargain with the incumbent union Local 247 as "the continuity of the workforce and continuity of the enterprise" are present. *NLRB v. Burns International Security Services, supra*. The "continuity of the workforce" factor is satisfied because L.L.C. hired all five of Paving's Wixom drivers, the entire complement of the appropriate collective bargaining unit. The "continuity of the enterprise" test is satisfied because from the drivers' perspective, they use the same facilities and equipment, report to the same supervisors, and perform the same job functions under L.L.C. as they did for Paving. *Fall River Dyeing, supra* at 33; *Sierra Realty Corp.*, 317 NLRB 832, 835 (1995); *Nephi Rubber Products Corp.*, 303 NLRB 151, 152 (1991), enfd. 976 F.2d 1361 (10th Cir. 1992); *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982), enfd. 709 F.2d 623 (9th Cir. 1983); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063-1064 (2001); *Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973); M.S. Management Associates, Inc.*, 325 NLRB 1154, 1155 (1998), enfd. 241 F.3d 207 (2nd Cir. 2001).

Levy and Old Castle entered into a transaction agreement creating L.L.C. on June 20, 2003. On July 2, MPMC nominally took charge of L.L.C. operations. However the Wixom Drivers continued to drive the same lowboy and prime trucks, to park them in the

same locations, to be scheduled to work by the same area managers, and to report to the same foremen at job sites. After L.L.C. representative Dennis Rickard formally announced the joint venture on July 7th, nothing changed from the drivers' perspective. The Teamsters drivers performed the same kinds of Paving jobs under the same working conditions and continued to serve the same public sector and private commercial customers. The transition from Paving to L.L.C. was invisible in July and seamless through the end of the 2003, paving season.

General Counsels further contend in brief that L.L.C. is a "perfectly clear" successor to Paving, and therefore bound by the terms and conditions set forth in Paving's contract with Teamsters Local 247, because it offered job applications to all of Paving's drivers and made it "perfectly clear" that it would hire all of them before informing them that L.L.C. would not honor the Teamsters' terms and conditions of employment. L.L.C. offered job applications to all of Paving's drivers at the July 7th meeting and on that day, the drivers completed and submitted the applications. At no time during this meeting did L.L.C. agents mention changes in the Teamsters employees' negotiated wages, benefits and other terms and conditions of employment. Consequently the drivers reasonably assumed their terms and conditions of employment, including their Teamsters status would remain the same. It was not until July 15th, at which time the drivers had been working for L.L.C. for at least eight days that L.L.C. advised that it would not recognize the Teamsters. By misleading the drivers into believing that there would be no change in their employment conditions prior to inviting them to apply and hiring them, L.L.C. forfeited its privilege as a *Burns* successor to set its own initial terms and conditions of employment. Instead L.L.C. was obligated to honor the terms and conditions set forth in Paving's contract with Teamsters Local 247 until it bargained with Local 247 to change those terms and conditions or reached good-faith impasse. General Counsel also contends that under *Advanced Stretchforming International, Inc.*, 323 NLRB 529, 530 (1997) enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001), L.L.C. also forfeited its rights to set initial terms and conditions of employment.

General Counsel contends alternatively that L.L.C. is the alter ego of Paving with a contractual duty to abide by Paving's MRBA agreement. Paving and L.L.C. employed substantially identical management and supervision at the Wixom facility. Although L.L.C.'s upper-level managers came from MPMC, Levy's co-equal partnership status assured Levy the right to appoint one-half of L.L.C.'s board of directors. Commonality of ownership also obtains, by virtue of Levy's 50% ownership interest in L.L.C.. The business purpose, customers and operations of Paving and L.L.C. are also mutual. Paving's Wixom facility, home to the Teamsters drivers, continued to be a fully functioning facility for L.L.C. employees during the 2003 season. The alter ego finding is justified by Pavings's and L.L.C.'s substantially identical operations and supervision, shared business purpose and premises, similar customers and equipment and overlapping ownership. By operation of law, L.L.C. is therefore bound as a party to Paving's MRBA contract with Local 247. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942); *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259, n. 5 (1994). The terms and conditions that L.L.C. was required to offer under the "perfectly clear"

Burns or *Advanced Stretchforming* rationales, and the contract to which L.L.C. is bound under the alter ego theory, is the 2003-2008 MRBA agreement. A participant in multi-employer bargaining may only withdraw from the group if it gives timely, unequivocal and written notice to the affected union. *Retail Associates, Inc.*, 120 NLRB 388 (1958). The timelines requirement is met if the employer gives notice prior to the date on which negotiations are set to commence or actually commence. *NLRB v. Charles D. Bonanno Linen Service, Inc.*, 454 U.S. 404 (1982). In 1986 Paving signed an open-ended power of attorney designating the MRBA as its bargaining agent to negotiate and sign collective-bargaining agreements with Teamsters Joint Council 43, Local 247's bargaining agent in dealings with the MRBA. The document has no expiration date. On April 28, 2003, Joint Counsel 43, led by Aloisio and the MRBA led by attorney Frank Mamat, opened negotiations on a new five-year contract. A successor agreement for the term 2003-2008 was reached on June 13. Paving has never served any notice, let alone timely unequivocal, and written notice, that it wished to withdraw from multi-employer bargaining. Therefore Paving was bound by the 2003-2008 agreement that its bargaining agent, the MRBA, negotiated with Teamsters Joint Council 43.

B. Respondents' Position

The Respondent L.L.C.'s Counsels in their brief, which has been adopted by Paving, contend that Counsels for the General Counsel have failed to meet their burden of establishing violations of the Act. They contend that L.L.C. is not a single employer, or an alter ego, as it is not managed by the same company or individual as Paving. L.L.C.'s management structure has changed above the level of Wixom Division Manager Elliot. Until July 1, 2003, Paving's operations were managed by Andy Schmidt, a Levy employee who supervised Elliot. Schmidt was not hired to manage L.L.C.. L.L.C. hired only 6 out of 15 Levy management employees that had previously worked for Paving in Wixom.

On July 1, 2003, Alan Sandell, a former Michigan Paving employee, was hired and began working as General Manager for L.L.C.. Sandell has operational responsibility over all five operating divisions of the L.L.C.. Dan Stover, a Regional Manager, who also formerly worked at Michigan Paving, assists Sandell in operating the Wixom, Rawsonville, and Dix divisions. Richard Brillhart, another Regional Manager for L.L.C. assists Sandell with running the Clarkston and Whitmore Lake divisions. The Division Managers for all five operating divisions at L.L.C. report directly to Sandell, Stover or Brillhart, not Schmidt. Elliot reports directly to Stover. Sandell reports to Dennis Rickard, the President of Michigan Paving, not a Paving or Levy employee. Rickard has ultimate authority over labor relations at L.L.C., although the vast majority of day to day decisions are made by Sandell. Although Michigan Paving and Levy each have two members on the L.L.C. Board of Directors, the Board of Directors has no control over L.L.C.'s labor relations. Labor relations matters were previously handled by Schmidt or Levy's Human Resources Department. However L.L.C. does not have a Human Resources staff. Instead the Division Managers perform the human resources functions. L.L.C. has different employment policies than Paving. Corporate ownership is different. Paving was 100 percent owned by Levy and Levy had full operating control

over Paving. Under the joint venture agreement Levy shares equity ownership of L.L.C. equally with Michigan Paving. Levy has no operating control over L.L.C.. Instead, Michigan Paving has 100 percent control over all operating decisions with respect to its daily operations. Respondent cites *First Class Maintenance Service*, 289 NLRB 484 (1988), (finding no alter ego status where there was no substantially identical ownership, management or supervision). Whereas Levy originally had 100 percent ownership and complete operational control over Paving, under the Joint Venture Agreement it now has only 50 percent equity ownership over L.L.C. and no operational contact. There is no common management or centralized control of labor relations in this case. Dennis Rickard and former Michigan Paving employee Sandell now manage operations of L.L.C., not any employees from Paving or Levy. Although there is some diminished common ownership, the total lack of labor relations or operational contact effectively neutralizes this factor. Although Division Manager Elliot and Area Managers Fred Aiken and Clyde Hatfield had worked for Paving in the same capacity and were hired by L.L.C., they are merely front line supervisors and do not report to any Levy or Paving employees. Under L.L.C.'s management structure neither Levy or Paving exercise any operational control over L.L.C. or control its labor relations. Respondent argues further that L.L.C.'s operations are now different. It argues that Michigan Paving owns several other paving operations in Michigan and that at these facilities, the spraying of the asphalt sealant coat is done by the laborers. The equipment operators both deliver equipment to, and operate it on the work site. L.L.C. does not have lowboy drivers transport equipment to and from the jobsite. The former lowboy drivers now perform responsibilities as operators. They drive equipment to the job site, operate the equipment, and drive the equipment from the job sites. Since it was already in the middle of the paving season when L.L.C. took over, it was unable to adopt the Michigan Paving business model during the remainder of the 2003, paving season. However in the off-season L.L.C. acquired new equipment, such as lowboy trailers which allowed it to adopt the Michigan Paving business model for the 2004 paving season. Respondent also contends that there have been numerous changes in operational philosophy and corresponding changes in job duties at L.L.C.. Respondent contends further that there is no evidence that L.L.C.'s formation was motivated by union animus. L.L.C. has a relationship with the laborers and Operators unions and all construction employees are represented by these two unions and in July 2003, L.L.C. negotiated collective bargaining agreements with the Laborers and Operators which run through 2008.

Respondents cite their effort to retain the Teamsters as employees and to ensure that they were accorded health insurance and did not suffer a loss in wages because of the switch from the Teamsters union to the Laborers or Operators unions. They also cite as significant that Teamsters employees Pierce and Taylor were permitted to continue to work at L.L.C. even though they refused to sign with the Laborers or Operators.

Respondents contend that since L.L.C. is not a single employer it is not an alter ego. Respondents argue further that L.L.C. is not a successor employer. They do not dispute that L.L.C. hired a majority of Paving's construction employees but deny that L.L.C. is a *Burns* successor to Paving due to the operational changes that have taken place. Respondent cites *Border Steel Rolling Mills, Inc.*, 204 NLRB 814, 821 (1973) in

which the Board held that the "critical question is not whether [L.L.C.] succeeded to [Paving's] corporate identity or physical assets, but whether [L.L.C.] continued essentially the same operation, with substantially the same employee unit whose duly certified bargaining representative was entitled to statutory recognition at the time (L.L.C.) took over." Respondent notes that in answering this question, the Board will examine: (1) whether there has been a substantial continuity of the same operations; (2) whether the new employer uses the same plant; (3) whether it has the same or substantially the same workforce; (4) whether the same jobs exist under the same working conditions; (5) whether it employs the same supervisors; (6) whether it uses the same machinery, equipment, and methods of production and (7) whether it manufactures the same product or offers the same services, citing *Deferiet Paper Co. v. NLRB,* 235 F.3d 581, 584 (DC Cir. 2000) stating that an alleged successor employer may demonstrate that a pre-existing unit is no longer appropriate by showing significant revisions in plant operations and employee duties. Respondent argues that given the significant operational changes that took place, the Teamsters bargaining unit consisting solely of truck driver employees is no longer appropriate. Respondent also contends that the General Counsel did not introduce a Board certification, or other evidence describing the Teamsters unit and that the only evidence produced on this issue was Aloisio's testimony that the Teamsters represented "employees" at Paving for "probably" 25 or 30 years. Respondent contends that it is thus unclear whether Paving ever recognized the Teamsters and, if so how and when the Teamsters unit was recognized, and what employees should belong to the bargaining unit. Respondent contends that as of July 16, 2003, the truck driver classification represented by the Teamsters was eliminated and ceased to exist. Since L.L.C. adopted the Michigan Paving business model, equipment operators, not lowboy truck drivers, were responsible for transporting their own equipment to and from a job site. Instead, former lowboy drivers were reclassified as equipment operators and could spend a significant portion of their workday at the job site operating equipment such as graders, pavers and rollers, with the operators. This change in duties created an exact community of interest between the former lowboy drivers and operators since the employees worked side-by-side on a daily basis performing the same work. Similarly the distributor drivers did not solely or primarily drive a truck. Both Pierce and Raymo testified that driving a distributor truck did not take up an entire workday and they spent the rest of the workday performing other tasks alongside the laborers such as shoveling and raking asphalt. They were thus working out of their classification and were working within the laborers bargaining unit. Thus the former Teamsters represented employees no longer constituted an appropriate bargaining unit. The former bargaining unit is no longer appropriate because of "changed circumstances" arising from a shift in ownership or change in business operations, citing *Border Steel Rolling Mills, Inc., supra* at 820-22. L.L.C. is not a *Burns* successor. Respondent argues further that even if L.L.C. is found to be a *Burns* successor, it still has the right to establish initial terms and conditions of employment for he Teamsters employees, citing *Fall River Dyeing & Finishing Corp. v. NLRB, supra.*

Respondent argues further that L.L.C. did not forfeit its right to establish initial terms and conditions of employment as it has not committed any unfair labor practices. Neither the *Spurce Up* nor the "perfectly clear" exceptions to *Burns* apply. The

Teamsters employees began working for L.L.C. on July 16, 2003. Employees were issued paychecks by Paving until July 15, 2003. Thereafter they received checks from L.L.C.. On July 11, 2003, Sandell informed all Teamsters members, that upon working for L.L.C., they would be subject to new terms and conditions of employment. Pierce contends that he is "relatively sure" that Sandell did not meet with the Teamsters members to discuss their further terms and conditions of employment until July 15, 2003. Sandell testified he is "quite positive" the meeting took place on July 11, 2003. Elliot corroborated Sandell's testimony, while Raymo could not recall the specific date of the meeting. Regardless of whether the meeting occurred on July 11 or July 15, 2003, Pierce and Raymo both understood, prior to starting work on July 16, 2003, that the Teamsters employees would be subject to terms and conditions of employment including wages and benefits based on the Operators or Laborers agreements with L.L.C.. Elliot testified he never told any truck drivers, they would have their Teamsters benefits once they became employed by L.L.C.. Since L.L.C. advised Teamsters employees, prior to taking over on July 16, 2003, that it was going to establish new terms and conditions of employment, it did not forfeit its right under *Burns* to set initial terms and conditions of employment in the event it is found to be a successor of Paving, citing *Planned Building Services, Inc.*, 318 NLRB 1049 (1995) (employer properly established initial terms and conditions of employment because it made lawful *Spruce Up* announcement). Pierce testified that prior to July 11, 2003, Aiken assured him that he and the other employees would remain Teamsters for at least the 2003 paving season. The Board has refused to bind an employer to erroneous comments made to employees about their future working conditions where it subsequently advised them prior to their hire of their actual terms and conditions of employment citing *Bekins Moving & Storage Co. L.L.C.*, 330 NLRB 761, 763 (2000). Since L.L.C. advised Teamsters employees, prior to taking over on July 16, 2003, that it was going to establish new terms and conditions of employment, it did not forfeit its right under *Burns* to set initial terms and conditions of employment in the event it is found to be a successor to Paving. *Bekins Moving & Storage*, *supra*; *Planned Building Services*, *supra*.

Respondent contends that there is no collective bargaining agreement for L.L.C. to assume. L.L.C. is not bound by the Roadbuilders Agreement signed by the Teamsters since it never signed the Agreement, authorized anyone to sign it on its behalf, or assumed the contractual obligations, citing *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, *supra*. L.L.C. never assumed the Roadbuilders agreement. The current Roadbuilders Agreement does not contain a successor clause binding L.L.C. to the contract terms. Respondent is not bound to the Roadbuilders Agreement by a "power of attorney" that Paving purportedly submitted to the Roadbuilders in 1986. Counsel for General Counsel failed to call any witness at the hearing (even though the Roadbuilders Keeper of Records was subpoenaed to appear) to authenticate the power of attorney, or ensure that other documentation did not exist, which modified, or withdrew the power of attorney. Aloisio and Pierce both testified they had never previously seen the power of attorney. There is no competent evidence to bind L.L.C. to the current Roadbuilders contract with the Teamsters. Alternatively even if L.L.C. is bound by the Teamsters/Roadbuilders contract the earliest it was bound to start following the contract was Spring 2004, when the Teamsters finally ratified the agreement.

IV. Analysis

I find that L.L.C. is a single employer under the Act. In the event that the Board does not agree with this finding, I find in the alternative that L.L.C. is an alter ego under the Act. In the event the Board does not agree with this alternative finding, I find in the alternative that L.L.C. is a *Burns'* successor of Paving. I find that the cases cited by the General Counsel in brief are supportive of these findings. In the instant case the Teamsters Local 247 has represented the unit of drivers at Paving for over 25 years and has negotiated contracts through the representation of Council 43 of the Teamsters with the Michigan Road Builders Association (MRBA) which organization has represented the Respondent Paving. I find the evidence supports a finding that L.L.C. hired the five drivers in the Teamsters unit on July 7, 2003, at the meeting of all 50 plus Paving employees when L.L.C.'s President Rickard informed all of its employees in the three bargaining units (Teamsters, Operators and Laborers) of the joint venture and that it was effective on July 16, 2003. At that meeting MPMC's safety director, Marlene Van Patton gave out applications to all the employees and told them to disregard filling out the work history and experience sections of the applications, indicating that the applications were being solicited for payroll purposes. At this time there was no mention of any withdrawal of recognition from the Teamsters for the truck drivers. The truck drivers continued to perform their normal work duties day after day thereafter making it "perfectly clear" that the five truck drivers had been hired at the original meeting of July 7, 2003, by Rickard who addressed them. Thus, once hired without any reservations the bargaining unit was intact and Teamsters Local 247 remained as the collective bargaining representative of the truck drivers unit. It was not until July 15, 2003, that Respondent's manager Sandell announced to the drivers that it was withdrawing recognition from the Teamsters Local 247. However by this time L.L.C. had already employed the five drivers and L.L.C. had an obligation to recognize and bargain with Local 247. Its withdrawal of recognition and subsequent refusals to bargain were violative of Section 8(a)(5) and (1) of the Act. It is also clear that the July 15, 2003 statement by Rod Elliot to the Teamsters employees that they could not continue to work as Teamsters but would be required to join either the laborers or operators unions was coercive and violative of Section 8(a)(1) of the Act.

I credit the testimony of Pierce and Raymo that the employees were told they would have to join either the laborers or operators unions if they wanted to continue working. These statements had a coercive effect as two of the lowboy drivers joined the operators union and driver Raymo left his employment ("took the layoff") under these coercive conditions. Thus Raymo was constructively discharged by Respondent as he feared he would lose the benefits of the Teamsters health insurance for his wife who was facing major surgery. This ultimatum by Respondent left Raymo with a Hobson's choice of either joining the laborer's union or taking a layoff, which culminated in Raymo's constructive discharge. I find no merit to Respondent's defense of this allegation that it did not use the exact verbiage of telling the employees to join the operators or laborers unions or they would be fired. I find Respondent delivered the message in sufficiently specific terms that they must join one of these unions if they wished to continue working as Respondent's employees. I find no merit to Respondent's defense that it did not

present the drivers with the Hobson's choice. Nor do I find any merit to its contention, that since it did not discharge the other two prime drivers Pierce and Taylor that this obviates the threat issued to these employees. By its constructive discharge of Raymo, Respondent violated Section 8(a)(1) and (3) of the Act.

I find the Respondents Paving and L.L.C. violated Section 8(a)(1) and (2) of the Act by rendering assistance and support to the Laborers and Operators Unions by ceasing to deduct Teamsters union dues and health and welfare and pension contributions from the drivers' wages and remitting them to the Teamsters funds and by withholding monies from the drivers' wages and remitting them to the Laborers and Operators Unions. These actions were carried out in spite of the fact that the drivers had authorized dues deductions and health and welfare and pension deductions to be remitted to the Teamsters Union and in spite of the fact that the drivers had not authorized the deduction of any monies from their wages to be remitted to the Laborers and Operators Unions. Furthermore the threats issued to the drivers that they either join the Laborers or Operators Unions or face layoff violated not only Section 8(a)(1) as unlawful threats to the exercise of their Section 7 rights under the Act but also violated Section 8(a)(2) of the Act as they constituted unlawful assistance to the Operators and Laborers.

The actual cessation of deductions on behalf of the Teamsters and the implementation of the deductions from the drivers wages and remittance to the Laborers and Operators violated Sections 8(a)(1), (2), (3) and (5) of the Act.

The direct dealing of Sandlin with the employees in offering to obtain insurance coverage of the L.L.C. policies for them violated Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. At all material times until about June 20, 2003, Respondent Cadillac Asphalt Paving Company (Paving) was an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. About June 20, 2003, Respondent Paving created Respondent Cadillac Asphalt, L.L.C. (L.L.C.), a limited liability company as a disguised continuance of Paving. Respondents are, and have been at all material times, alter egos and a single employer within the meaning of the Act. Since about June 30, 2003, Respondent L.L.C. has continued to operate the business of Respondent Paving in basically unchanged form, and has employed as a majority of its employees, individuals who were previously employees of Paving. Respondent L.L.C. has continued the employing entity and is a successor to Respondent Paving, and has been an employer within the meaning of Section 2(2), (6) and (7) of the Act.

3. At all material times herein, Charging Party Local 247, International Brotherhood of Teamsters, AFL-CIO, Michigan Laborers District Council, Laborers International Union of North America, AFL-CIO and Local 324, International Union of

Operating Engineers, AFL-CIO have each been labor organizations within the meaning of Section 2(5) of the Act.

4. All full-time and part-time drivers employed by Respondent Paving and later by L.L.C. at or out of their Novi Michigan facility, but excluding all office clerical employees, guards and supervisors as defined in the Act, and employees already represented by other labor organizations, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times since 1973 the Charging Party Local 247 of the Teamsters Union was the exclusive collective bargaining representative of the Unit employed by Respondent Paving.

6. About July and August 2003, Respondents by their agents Rod Elliot and Fred Aiken, at the Novi facility violated Section 8(a)(1) and (2) of the Act by threatening employees with layoff unless they transferred their union membership from the Charging Party Teamsters Union to either the Laborers or Operating Engineers.

7. Since about July 2003, Respondents, by their agents Rod Elliot and Fred Aiken, at the Novi facility violated Section 8(a)(1) and (2) of the Act by rendering assistance and support to the Laborers and Operating Engineers by:

(a) Urging unit employees to sign checkoff authorizations for said labor organizations.

(b) Deducting money from unit employees' wages and remitting it to the Laborers and Operating Engineers, notwithstanding the absence of employee authorizations for such deductions and remittance and notwithstanding that neither the Laborers or the Operating Engineers is the lawfully recognized exclusive collective bargaining representative of the unit.

8. About July 18, 2003, Respondents, by their agents, Rod Elliot and Fred Aiken, violated Section 8(a)(1) and (2) of the Act by telling unit employee Patrick F. Raymo that he must transfer his union membership from the Teamsters Union to keep his job.

9. On July 21, 2003, Respondents constructively discharged their Unit employee Patrick F. Raymo, in violation of Sections 8(a)(1) and (3) of the Act.

10. Respondents violated Sections 8(a)(1), (5) and 8(d) of the Act by failing to continue in effect all of the terms and conditions of the labor agreement by discontinuing dues deductions, health and welfare and pension contributions on behalf of Unit employees.

11. Respondents violated Sections 8(a)(1) and (5) of the Act by bypassing Local 247 of the Teamsters Union and dealing directly with their unit employees by offering to provide alternative health insurance coverage.

12. Respondents violated Sections 8(a)(1) and (5) of the Act by since about June 30, 2003, failing and refusing to recognize the Local 247 as the exclusive collective bargaining representative of the Unit and by refusing to bargain with the Teamsters Union.

13. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents violated the Act, they shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Respondents shall be ordered to recognize and bargain with Teamsters Local 247, and cease the unauthorized deductions of monies from the drivers wages and remittance of said monies to either the Laborers or the Operators Unions and to immediately reinstate the deductions from the drivers wages, and remit to Local 247 the dues and pension and health insurance contributions authorized to be made to Local 247. Respondents shall make the drivers whole for the monies unlawfully deducted from their wages and shall make Local 247 and the Teamsters funds and the drivers whole for Respondent's failure to make the authorized deductions for dues and the pension and health insurance funds and to remit them to the Teamsters funds.

I find that General Counsel has not authenticated the power of attorney which General Counsel contends bound the Respondent's to the 2003-2008 labor agreement. I accordingly shall issue the bargaining order for the period commencing as of June 30, 2003 forward.

Respondent having discriminated by discharging Patrick F. Raymo, shall be ordered to offer him reinstatement to his former position, or if his former position no longer exists, to a substantially equivalent position and make him whole for any loss of earnings and benefits he sustained as a result of the unlawful discrimination against him less any net interim earnings as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950). All amounts for unlawful deductions made from the drivers' wages and amounts unlawfully withheld by Respondents and all amounts for Raymo's backpay and benefits, shall be with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[5]

ORDER

The Respondent Cadillac Asphalt Paving Company and its alter ego or successor Cadillac Asphalt, L.L.C., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully threatening employees with layoff unless they transfer their union membership from Local 247, International Brotherhood of Teamsters, AFL-CIO to either the Laborers or Operating Engineers unions.

(b) Rendering assistance and support to the Laborers and Operating Engineers unions by:

1. Urging unit employees to sign check-off authorizations for said labor organizations.

2. Deducting money from unit employees' wages and remitting it to the Laborers and Operating Engineers, notwithstanding the absence of employee authorizations for such deductions and remittance and notwithstanding that neither the Laborers or the Operating Engineers is the lawfully recognized exclusive collective bargaining representative of the unit.

(c) Telling employees that they must transfer their union membership from the Teamsters Union to keep their job.

(d) Constructively discharging employees in violation of Sections 8(a)(1) and (3) of the Act.

(e) Failing to continue in effect all of the terms and conditions of the labor agreement by discontinuing dues deductions and health and welfare and pension contributions on behalf of unit employees.

(f) Bypassing the Teamsters Union and dealing directly with their unit employees by offering to provide alternative health insurance coverage.

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5 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Failing and refusing to recognize the Teamsters Union as the exclusive collective bargaining representative of Unit employees and by refusing to bargain with the Teamsters Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize and, on request immediately bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement:

> The appropriate unit is:
>
> All full-time and regular part-time drivers employed by Respondent Paving and later by Respondent L.L.C. out of their Novi facility, but excluding all office clerical employees, guards and supervisors as defined in the Act, and employees already represented by other labor organizations.

(b) Make drivers unit employees whole for all monies unlawfully deducted from their paychecks as found herein and rendered to the Laborers and Operating Engineers as set out in the "Remedy" section, with interest.

(c) Make the unit employee drivers whole for all loss of their dues and health and welfare and pension funds payments which were not remitted by Respondents to these funds, with interest.

(d) Make the drivers unit employees whole for all loss of health and welfare and insurance benefits which were sustained by them because of the aforesaid unfair labor practices, with interest.

(e) Within 14 days from the date of this Order, offer Patrick F. Raymo full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Patrick F. Raymo whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of the decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful constructive discharge and within 3 days thereafter notify

Patrick F. Raymo in writing that this has been done and that the constructive discharge will not be used against him in any manner.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Novi, Michigan copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2003.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

Lawrence W. Cullen
Administrative Law Judge

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6 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading **"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read **"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with layoff unless they transfer their union membership from Local 247, International Brotherhood of Teamsters, AFL-CIO to either Michigan Laborers District Council, Laborers International Union of North America, AFL-CIO or Local 324 International Union of Operating Engineers, AFL-CIO.

WE WILL NOT render assistance and support to the laborers and Operating Engineers unions by:

(1) urging unit employees to sign checkoff authorizations for these labor organizations.

(2) deducting money from unit employees' wages and remitting it to the Laborers and Operating Engineers, notwithstanding the absence of employees authorizations for such deductions and remittance and notwithstanding that neither the Laborers or the Operating Engineers is the lawfully recognized exclusive collective bargaining representative of the unit.

WE WILL NOT tell employees that they must transfer their union membership from the Teamsters Union to keep their job.

WE WILL NOT constructively discharge employees in violation of Sections 8(a)(1) and (3) of the Act.

WE WILL NOT fail to continue in effect all of the terms and conditions of the Teamsters labor agreement by discontinuing dues and health and welfare and pension contributions on behalf of unit employees.

WE WILL NOT bypass the Teamsters Union and deal directly with their unit employees by offering to provide alternative health insurance coverage.

WE WILL NOT fail and refuse to recognize Local 247, International Brotherhood of Teamsters, AFL-CIO as the exclusive collective bargaining representative of the unit employees and by refusing to bargain with the Teamsters Union on behalf of the employees in the following appropriate unit:

> All full-time and regular part-time drivers employed by Respondent Paving and later by Respondent L.L.C. out of their Novi facility, but excluding all office clerical employees, guards and supervisors as defined in the Act, and employees already represented by other labor organizations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request bargain with Local 247of the Teamsters Union as the exclusive representative of the employees in the aforesaid appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make the driver unit employees whole for all monies unlawfully deducted from their paychecks as found herein and rendered to the Laborers and Operating Engineers' health and welfare funds and pension funds, with interest

WE WILL make the drivers unit employees and Local 247 whole for all loss of health and welfare and pension fund payments which were not remitted by these Respondents to these funds, with interest.

WE WILL make the drivers unit employees whole for all loss of health and welfare and insurance benefits which were sustained by them because of the aforesaid unfair labor practices, with interest.

WE WILL within 14 days from the date of this Order, offer Patrick F. Raymo full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick F. Raymo whole for any loss of earnings and other benefits sustained by him as a result of the unlawful discrimination against him, with interest.

WE WILL expunge from our files any reference to the unlawful constructive discharge of Patrick F. Raymo and will notify him in writing that this has been done and that this personnel action will not be used against him in any manner.

CADILLAC ASPHALT PAVING COMPANY and its alter ego or successor CADILLAC ASPHALT, L.L.C.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the Nation Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue - Room 300, Detroit, MI 48226-2569
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (313) 226-3244